HD 1694
.W6 H6

Copy 2

FT MEADE
GenColl

THE LIBRARY OF CONGRESS

THE LIBRARY OF CONGRESS

F368
320

# Title to Water Powers of Navigable Rivers in Wisconsin

12-29022

## Do they Belong to the State or the Riparian?

Revised
Brief in Behalf of the
Riparian Claim

CASTLE-PIERCE PRESS, OSHKOSH

HD1694
W6A6
. cop 2

A contention has arisen respecting the relation of the State on the one side, and the riparian on the other side, to the water powers of the navigable rivers of Wisconsin.

There ar those who claim that the water powers, being soveren resources, are owned, and should be held, by the State.

There ar others who claim that, even if the riparian does own such water powers yet, he needs State action to authorize him to improve the same. Hence that the State shoud, if it can, prevent the improvement except upon payment of revenue to the State.

This brief has been prepared in the interest of the riparian.

OCT 10 1914

# TITLE TO WATER POWERS OF NAVIGABLE RIVERS

Is the water power of a navigable river in Wisconsin the property of the State or of the riparian? It cannot be both.

## RIPARIAN OWNERSHIP.

### COMMON CONSENT.

It has been uniformly held, since prior to organization of this State, to be private property, and to be owned by the riparian, subject and servient to the dominant easement of the public for uses of navigation, and fishing as incident to navigation. The riparian has been asest on, and paid taxes on, its valuation. He has bilt mils of all kinds and operated them by its use, under claim of right, from the erliest setlment of the State. Such facts ar very persuasive. It is a maxim that common error makes law.

### RELINQUISHMENT BY STATE.

If this property in water power of navigable rivers was ever the property of this State, subject to its control otherwise than by eminent domain, —the right to take for public use on making just

compensation—this State has, if it coud, turnd it over to the riparian by both legislation and judicial decision.

## STATE LEGISLATION.

It seems that at an erly day some similar question arose respecting the relativ rights of the State and the riparian to such rivers. Evidently there was an attempt to settle the matter by chapter 72, laws of 1853. Section 3 provides that,

> "The boundaries of lands adjoining waters, and **the several and respective rights of individuals, the State, and its citizens, in respect to all such lands and waters,** shall be determined in conformity to the common law, so far as applicable as evidenced by judicial determinations in other states, in which the courts in such cases have adhered to its principles."

Nothing in law is more certain than that at common law, waters wer, tide waters which wer public and navigable, and non-tide waters which wer, some navigable and some non-navigable. It was equally setld at common law that the title to the beds of tide waters was in the soveren, held in trust for the pepl, and the title to the beds and water powers of non-tide waters was in the riparian, subject and servient to the dominant easement of the public for uses of navigation, and fishing as incident to navigation.

But it may be asked,—wer the common law rules respecting the rights of riparians on non-tidal, navigabl rivers then "applicable as evi-

denced by judicial determinations in other states'' to our great western rivers? For answer to that question, we naturally look to the rule then held by the States carved out of the territory northwest of the Ohio included in the Virginia cession, and for government of which the Ordinance of 1787 was established. Such States then,—in 1853,—wer Ohio, Indiana, Illinois, Michigan and Wisconsin.

The Court of Final Resort in each of said States, other than Wisconsin, had then held such common law rule applicabl to such rivers. (1).

So also had Kentucky, carved out of Virginia territory in 1791. (1 U. S. Stat. 189). (2).

---

NOTE 1—Blanchard vs. Porter, 11 Ohio, 138 (Ohio, 1841);
Gavit vs. Chambers, 3 Ohio, 495, 499 (Sandusky, 1827);
Lamb vs. Rickets, 11 Ohio, 311 (Tuscarawas, 1842);
Walker vs. Board of Public Works, 16 Ohio, 540 (Great Miami, 1847);
Cox vs. State, 3 Blackford, 193, 198 (White, 1833);
Middleton vs. Pritchard, 4 Ill., 509 (Mississippi, 1842).
Norris vs. Hill, 1 Mich., 202, 207 (Huron, 1849);
Moore vs. Sanborn, 2 Mich., 519 (Pine, Jan. 1853).

---

NOTE 2—Hart vs. Rogers, 48 Ky., 418, 422-3 (Kentucky, 1849).

So also had Tennessee, ceded by North Carolina in 1790. (3).

In 1844, the great Chief Justice Sharkey decided the leading case, Morgan vs. Reading. (4).

Expressing the opinion of the Court that the riparian on the Mississippi River owned the bed of the stream, he said,

> "It seems that the common law rule admits of no modification in consequence of the magnitude of a river." (403).

The Mississippi was an interstate boundary and by treaty "free and open to the subjects of Great Britain and the citizens of the United States." (5).

The applicability of the common law was thuroly considered. The fact that the stream was subject to international treaty was not overlookt. The area of Mississippi was ceded by Georgia on substantially the same conditions as the cession of the territory northwest of the Ohio by Virginia. (1 U S. Stat. 649).

Probably the most authoritativ and generally read legal treatise then (in 1853) existing in Amer-

---

NOTE 3—Stuart vs. Clark, 32 Tenn., 9, 16-7 (Nolachucky, 1852).

---

NOTE 4—Morgan vs. Reading, 11 Miss., 366 (1844).

---

NOTE 5—Provisional Articles 1782, Art. 4, (8 Stat. 57);
Definitive Treaty of Peace, 1783, Art. 4 (8 Stat. 83).

ica was Kent's Commentaries. Kent said (V. III. *427),

> "grants of land, bounded on rivers * * * above tide water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river."

He further said in substance that this was the rule of all the States except Pennsylvania and the two Carolinas (V. III. *429-30-31).

He further says,

> "It would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the owner, in such cases, to the edge of the river." (*428).

In 1805, as Chancellor, Mr. Kent applied the same rule to the Hudson. (6).

The rule of the Federal Courts was then to the same effect.

In Jones vs. Soulard (65 U. S. 41, 1860), Mr. Justice Catron, expressing the opinion of the Court, said (65),

> "Many authorities resting on adjudged cases have been adduced to us in the printed argument presented by the counsel of the defendant in error, to show that from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh-

---

NOTE 6—Palmer vs. Mulligain, 3 Caines Reports 308 at 318 (1805).

> water rivers, where the expressions designating the water-line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions.
>
> We think this as a general rule too well settled, as part of the American and English law of real property, to be open to discussion.''

The great case of the Genesee Chief (7) was decided in 1851. Therein Chief Justice Taney in a very lernd opinion, reversing the case of The Thomas Jefferson, held that the act of Congress (5 Stat. 726) extending admiralty jurisdiction to the Great Lakes was constitutional. But he expressly limited the decision to the effect of the act on the admiralty jurisdiction, denying that the decision affected any rule of property. He said (458-9),

> ''The case of The Thomas Jefferson did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case **stare decisis** is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced

---

NOTE 7—Propeller Genesee Chief vs. Fitzhugh, 53 U. S. 443.

> by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property, nor interfere with any contracts heretofore made.''

The question of the applicability of the common law rule of ownership of the bed of the stream was logically the same as the question of its applicability to the ownership of the water powers. The questions wer twins.

Hence this statute of 1853 must be interpreted in view of this uniform line of judicial decisions.

This statute continued in force unchangd, until the revision of 1878. It was then recast by the revisers and appears in the revision of 1878 as section 1597, in the following language,

> ''The boundaries of lands, adjoining waters, and **the rights of the state and of individuals in respect to all such lands and waters** shall be determined in conformity to the common law, so far as applicable.''

The revisers state their reason for the omission of the words ''as evidenced by judicial determinations in other States, in which the Courts in such cases have adhered to its principles,'' in the recast as follows:

> ''Sec. 1597. Sec. 3 Ch. 41, R. S. 1858, omitting the words which do not limit the knowledge of the common law which our court has by the want of knowledge of other courts.'' (Revisers Notes p. 124).

In 1878, at time of adoption of this revision, our Supreme Court had repeatedly determined that the riparian owner on navigabl rivers took title to the river bed, his title extending to the midl thred of the stream. (8).

At the same time the court had decided several cases arising out of riparian claims to water power. In all these cases the court assumed that the riparian was the owner of the water power of a navigabl river. (See cases cited in Note 10 post.) Evidently this recast was made with these decisions in the mind of the revisers.

How, then, can it be contended that riparians who took title to their lands under these Statutes do not own, as against the State, the water power appurtenant? It seems to me that this Statute directly asserts the riparian title to the water power.

STATE DECISIONS.

An unbroken line of State decisions maintains the same rule as this Statute declares, and holds

---

NOTE 8—Jones vs. Pettibone, 2 Wis., 308 (Oconto, 1853);
Walker vs. Shepardson, 4 Wis., 486, 508 (Milwaukee, 1855-6);
Mariner vs. Schulte, 13 Wis., 692, 705 (Milwaukee, 1860);
Arnold vs. Elmore, 16 Wis., 509, 514 (Milwaukee, 1883);
Wis. Riv. Impt. Co. vs. Lyons, 30 Wis., 61, 64-5 (Wisconsin, 1872);
Oleson vs. Merrill, 42 Wis., 203, 211 (Levis Creek, 1877).

the water powers to be the property of the riparian. (9).

By Act of Congress, August 8, 1846 (chapter 170), land was granted to Wisconsin, in trust, for the improvement of navigation of the Fox and Wisconsin Rivers. This grant was accepted by Wisconsin by act approvd June 29, 1848. By act approvd August 18, 1848, the State of Wisconsin organizd the Board of Public Works, and formulated a general plan to execute the trust. By section 16 of this act, it was provided that

> "Whenever a water power shall be created by reason of any dam erected or through improvements made on any of said rivers, such water power shall belong to the State subject to future action of the legislature."

By chapter 283, Laws of Wisconsin for 1850, provision was made for application of the purchase price of any water power to the construction of the improvement. See post. p. 62.

Here was assumption of title to the water power by the State, the proceeds to be devoted to pub-

---

NOTE 9—G. B. & M. C. Co. vs. Kau. W. P. Co., 70 Wis., 635 (1888);
Kimberly & Clark Co. vs. Hewitt, 79 Wis., 333 (1891);
West vs. Fox River Paper Co., 82 Wis., 647 (1892);
Fox River F. & P. Co. vs. Kelly, 70 Wis., 287 (1888);
Kaukauna W. P. Co. vs. G. B. & M. Canal Co., 75 Wis., 385 (1890);
Comr. vs. Little Suamico, 74 Wis., 652 (1889).

lic use, the improvement of navigation. No more fit public use of proceeds of water powers can be imagind. The right of the State to the water power as agenst the riparian, came to the test in the State Supreme Court in G. B. & M. C. Co. vs. Kau. W. P. Co. Therein Justice Lyon said (p. 652),

> "It is further claimed on behalf of the defendants that by locating the south end of the dam upon lot 5, building an embankment thereon and on lots 6 and 7, and appropriating the whole water power created by the dam, the State took the property of the owners of those lots, and that the laws of the State made no adequate provision for compensating them therefor. A riparian owner upon a navigable stream has no right, without legislative consent, to build a dam across such stream for any purpose. Wis. R. Imp. Co. vs. Lyon, 30 Wis., 61. **He has the right,** however, to pass from his land to the river, and from the river to his land, and **to utilize the waters of the river upon his land for any purpose not interfering with the navigation of the stream** or the rigths of other riparian owners. That the construction of the Kaukauna dam and the improvement by the State, and its appropriation of the water-power thereby created, did take the property of the owner of lot 5, and deprive him of his riparian rights just mentioned (which are also property), does not seem to admit of doubt or controversy. Such owner has never been compensated for his property so taken; neither has he released his right thereto." * * *

(654) "But the act of 1848 failed to give the land owner the right to institute con-

demnation proceedings under it to have his compensation determined." * * *

(655) "The failure of the State legislature to provide adequate compensation for private property taken for, or injured by, the improvement, has been supplied by the act of Congress of 1875, in and by which an easy method is provided to ascertain the compensation to which the owner of such property is entitled, and the United States has assumed the payment thereof." * * *

(656) "Hence, when the act of March 3, 1875, was passed, compensation was owing to the owner of lot 5 for the taking of and injury to his property, which is still a valid claim against the United States. And this, we think, includes any deprivation or interruption of any legal riparian right. * * *

It follows, we think, from the views above expressed that neither of the defendants had any right whatever to draw water from the pond in question, and that the plaintiff is the legal owner of the water-power created by such dam over and above what is required for navigation."

(658) "The writer ventures to express the opinion that there are federal questions involved in it which will support an appeal to the supreme court of the United States, and the desire that such an appeal may be taken, to the end **that the relative rights of the plaintiff and other claimants to water-power** created by the improvement of the Fox river, now owned by the United States, **may be finally determined** by that tribunal."

Kimberly & Clark Co. vs. Hewitt related to the

water power of the Fox River. Therein Justice Lyon said (337),

> "The rule is elementary that, unless affected by license, grant, prescription, or public right, or the like, **every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to the use of the water** as it is wont to run, without material alteration or diminution."

In West vs. Fox River Paper Company, the contention was between opposit riparian owners respecting the water power of a public navigabl river. There was no intervention by the State. Therein Justice Orton said (656),

> "Second. It follows, therefore, that **the plaintiff is entitled to the natural flow** of the south channel where his dam is situated, **for hydraulic purposes**, and the whole thereof, by reason of his being the owner of the island on one side, and of the mainland on the other. * * * The full expression of the plaintiff's right to the water-power to this extent should be that he is the owner of the abutting land, and still owns the riparian rights thereof, or the owner of the right of flowage or use of the abutting land for the purpose of landing a dam thereon, and the owner of the dam built for the purpose of making the water-power at that point available."

Fox River Flour & Paper Co. vs. Kelley involvd a contention respecting the rights of ripar-ians to a water power on the public navigabl river, the Fox. Therein Chief Justice Cole says (293),

> "This case involves questions relating to riparian rights; and it may be well, at the outset, to refer to some elementary doctrine

which defines or states what these rights are. In Head v. Amoskeag Mfg. Co., 113 U. S., 9-23, Mr. Justice Gray says: 'The right to the use of running water is **publici juris,** and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. **One reasonable use of the water is the use of the power** inherent in the fall of the stream and the force of the current to drive mills. That power cannot be used without damming up the water and thereby causing it to flow back.' In Bates v. Waymouth Iron Co., 8 Cush., 548-552, Chief Justice Shaw says: 'The relative rights of land-owners and mill-owners are founded on the established rule of the common law that every proprietor through whose territory a current of water flows in its course towards the sea, has an equal right to the use of it for all reasonable and beneficial purposes, **including the power of such stream for driving mills,** subject to a like reasonable and beneficial use by the proprietors above him and below him on the same stream. Consequently, no one can deprive another of his equal right and beneficial use by corrupting the stream, by wholly diverting it, or stopping it from the proprietor below him, or raise it artificially so as to cause it to flow back on the land of the proprietor above.' Chancellor Kent says: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands,

as it was wont to run **(current solebat)**, without diminution or alteration. No proprietor has a right to the use of the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. **Aqua currit et debet currere ut currere solebat,** is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it.' 3 Kent's Com. *439. The authorities might be multiplied indefinitely which define the right in substantially the same language, but it is unnecessary.''

Kaukauna Water Power Company vs. G. B. & M. Canal Co. presents a contention between the riparian owner, Kaukauna Water Power Company, asserting the riparian title, on the one part, and Green Bay and Mississippi Canal Company, asserting the title as grantee of the State, on the other part, respecting a water power at the Kaukauna Rapids below the government dam in the Fox River. Therein Justice Cassody says (390),

> ''It appears from the complaint that the plaintiff, as the riparian owner of the entire

south bank of the river from the government dam down to the channel between that bank and island No. 4, and the entire south bank of that channel from its mouth to the foot of the rapids, including half the bed of the stream, and the equal undivided three-fourths of the entire shore or bank of island No. 4, and of the land under water to the center of the channels entirely around the same, brings this action for the wrongful diversion of the waters of the river from said lands.

The rule of law as to the right of a riparian owner, respecting the flow of water over his land, is indicated in the authorities cited by counsel. The same principle has recently received direct sanction from the House of Lords, as follows: 'It has now been settled that the right to the enjoyment of a natural stream of water on the surface, **ex jure naturae,** belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state.' ''

Conn vs. Little Suamico was an action by a navigator "to recover damages for the obstruction of a navigable river and the consequent delay in the driving of the plaintiff's logs therein." Therein (656) Chief Justice Cole says,

"For if the right of floatage is paramount, so that no bridge or dam or other obstruction can be placed in or over the stream by the riparian owner, his use and enjoyment of his property are unnecessarily abridged and restricted. **Suppose the riparian proprietor owns the land on both sides of the stream, and there is a water power which can be utilized and made valuable by means of a dam, can he not construct such dam, and utilize his power,** providing he makes a reasonable provision for the passage of logs through his dam?

The rights of the riparian owner and of the public are both to be enjoyed with due regard to the existence and preservation of the other. The right of floatage of logs is not paramount in the sense that the using of the water by the riparian owner for machinery is unlawful so long as he does not materially or unreasonably interfere with the public right; * * * But he may use the stream and its banks for every purpose not inconsistent with the public use."

Besides the abuv cases in which the State Supreme Court has expressly declard the riparian to be the owner of the water power of the navigabl rivers, many other cases hav been adjudgd by that Court wherein the contention was between riparian claimants of water powers on such rivers, and wherein the riparian ownership was assumd by the Court. (10).

---

NOTE 10—The Orton-Noonan Cases on Milwaukee River, reported in 4 Wis., 335 (1856); 27 Wis., 272 (1870); 30

Wis., 611 (1872); 31 Wis., 265 (1872); 31 Wis., 297 (1872);
Blanchard vs. Doering, 21 Wis., 477 (Rock) 1867;
Blanchard vs. Doering, 23 Wis., 200 (Rock) 1868;
Samuels vs. Blanchard, 25 Wis., 329 (Rock) 1870;
Clark vs. Plummer, 31 Wis., 442 (Wisconsin) 1872;
Lawson vs. Mowry, 52 Wis., 219, 235 (Fox) 1881;
Valley P. & P. Co. vs. West, 58 Wis., 599 (Fox) 1883;
Mack vs. Bensley, 63 Wis., 80 (Wisconsin) 1885;
Pioneer W. P. Co. vs. Bensley, 70 Wis., 476 (Wisconsin) 1888;
Mack vs. Bensley, 74 Wis., 112 (Wisconsin) 1889;
Pioneer W.P. Co. vs. Chandos, 78 Wis., 526 (Wisconsin) 1891;
Janesville Cotton Mills vs. Ford, 82 Wis., 416 (Rock) 1892;
Jackson Milling Co. vs. Chandos, 82 Wis., 437 (Wisconsin) 1892;
Falls Mfg. Co. vs. Oconto R. I. Co., 87 Wis. 134 (Oconto) 1894;
G. B. & M. Canal Co. vs. Kau. W. P. Co., 90 Wis., 370 (Fox) 1895;
Appleton P. & P. Co. vs. K. & C. Co., 100 Wis., 195 (Fox) 1898;
Koenig vs. Watertown, 104 Wis., 409 (Rock) 1899.

Outside of Wisconsin, the decisions ar uniformly to same effect. Those presenting contentions between private parties ar too numerous for citation. Hence, those only ar mentioned wherein one contestant, directly or indirectly, represented the soveren.

## NEW YORK CASES.

Under the New York canal acts many contentions arose involving the right of the riparian, as agenst the State, to the water power of the nontidal navigabl rivers. (11).

---

NOTE 11—Exparte Jennings, 6 Cow., 519 (1826);
Varick vs. Smith, 5 Paige, ch. 137 (1835);
Varick vs. Smith, 9 Paige, ch. 547 (1842);
Canal Comrs, vs. State ex Rel. Tibbits, 5 Wend, 423 (1830);
Canal Comrs, vs. State ex Rel. Tibbits, 13 Wend, 355 (1835);
Canal Comrs, vs. State ex Rel. Tibbits, 17 Wend, 571 (1836);
Canal Comrs. vs. Kempshall, 26 Wend, 404 (1841);
People vs. Canal Appraisers, 33 N. Y., 461 (1865);
Chenango Bridge Co. vs. Paige, 83 N. Y., 179 (1880);
Dermott vs. New York, 99 N. Y., 101 (1885).

Amung them ar the following:

Ex-parte Jennings.

This case involvd the right of a riparian to compensation for dimunition in value of water power by operations of the State in aid of navigation. Decision was that the riparian was entitld to compensation. (528-536). This case was viewd as so important that the reporter, Judge Cowen, appended to the report a ful synopsis of Sir Mathew Hale's De Jure Maris upon the doctrines of which it is supposed to rest.

Varick vs. Smith and the Attorney General.

The State had bilt a dam in aid of navigation, and had least the incidental power of the surplus water not needed for navigation. Contention arose between a riparian below the State dam and the lessee of the State, defended by the State. The riparian asserted his title as such to the power of the fall upon his land agenst the lessee of the State of the incidental surplus. His claim to water power as riparian property was sustained by the lernd Chancellor Walworth and the diversion of the water restrained by injunction.

This case came to this lernd Chancellor agen. He said (9 Paige, 567-8),

> "The patent from the State to Varick for blocks 78, 90, 99 and 103 in West Oswego also refers in the same manner to a map filed in the office of the Secretary of State, which map bounds these blocks on the river without restriction. And the complainant under that grant was therefore entitled to the water and water privileges which were naturally connected with those lots."

Canal Comrs. vs. State ex rel Tibbits.

This case presented a contention between a riparian on the Mohawk and the State. The riparian claimd compensation for the injury to his water power by flooding from below. Compensation was denied on account that the injury was by operations in aid of navigation, and that the title to the bed of the Mohawk was in the State. The reports of this case show elaborate discussion of questions relating to riparian ownership of subaqueous lands under both common law and civil law, and of the relativ interests of the riparian and the State in the waters of non-tidal navigable rivers. But there was no suggestion by anyone, on either side, on either hearing, that the water power of such public rivers was not the property of the riparian. The scope of the inquiry is suggested by the following.

In 5 Wend., at 444, Chancellor Walworth says,

> "This is an important question, involving not only the claims of those **whose mills and mill sites have been destroyed** by the making of the Erie and Champlain canals, but also the rights of many other citizens to some of the most valuable property in the state. Many of our fresh water streams are navigable with boats and rafts, and have been declared **public highways** by the legislature, or have become so by prescription, and yet the original beds of some of these streams, and the banks of most of them are occupied by extensive milling and manufacturing establishments. The use of a part of the bed of the stream is absolutely necessary to the existence of these establishments, but it is probable that not in one case in a hundred has the public ever **expressly** granted the lands under the water. It therefore becomes our duty to examine this question with great caution; and with reference

to the important interests involved in it: for if the state has a right to take an **unoccupied**, and perhaps unimportant mill site, the title to which depends upon this principle of the common law alone, it may also have the right to take half a million of property from the owners, without compensation, which is claimed under a similar title.''

(447-8) ''The common law made ample provision for cases of this kind, by declaring waters thus useful for the purposes of commerce public highways. Thus while it assigned to the owners of the adjacent lands the legal title to the bed of the stream, they took it subject to the servitude, or right of the public to use the same for the purposes of navigation. It is on this principle that the people of this state, by their legitimate organ, the legislature, constantly exercise the power, which formerly belonged to the British crown, of declaring those waters which are thus navigable, public highways. **They also have the power to regulate the manner of building dams, and other hydraulic erections, so as to preserve this pubilc right of navigation**; but they have not the right to destroy the property of individuals for the purpose of making waters navigable which are not so by nature, or of appropriating such waters to the public use by artificial erections or improvements, except upon the constitutional terms of giving to the persons injured thereby a fair remuneration for their private losses. If, therefore, we had no adjudications on this subject in our own country, I think we should be bound to apply the rule of the common law to the case under consideration.''

At 455, Senator Allen says,

"Upon this principle, a man's property may be utterly ruined, as in the present case, and because nothing is taken, no redress for the damage sustained can be had. Suppose the dam in the Hudson had flooded the whole of Green Island instead of barely ruining the water fall of the defendant, will it be tolerated, because nothing was taken from the owner, that he must not be remunerated for the injury sustained? It cannot be. Individual property cannot be taken, or, which is the same thing, individual rights impaired, for the benefit of the public, without just compensation."

(456) "That the legislature of 1838 held the opinion that damage, such as the defendant has experienced, ought to be paid by the public, is evident from the act passed for the relief of Joseph D. Selden, in a similar case. Selden had, in 1822, purchased a lot of **land on the Mohawk river for hydraulic purposes**, but the construction of the Champlain canal deprived him of all his water privileges, and the object of his purchase was entirely defeated. Being one of the acting canal appraisers, he could not of course decide in his own case, and he accordingly applied to the legislature for relief. The result was, that an act was passed on the 18th of March, 1828, authorizing special appraisers to be appointed by the supreme court to assess the damage, and directing the comptroller to pay the amount to be assessed out of the treasury. I am unable to perceive any difference between the case of Selden and that of the present defendant. **They both purchased the water privileges for hydrau-**

> **lic purposes**, and considered them valuable for the uses intended. The rights of each are invaded for the same object, namely, the construction of a public work from which the state is deriving a revenue. They both derived title from Van Rensselaer (or those from whom they purchased did), and why one should be remunerated for the damage sustained, and the other not, it is hard to say."

The syllabus to the report of the final hearing of this case, (17 Wendell, 570) shows the determination of the Court thus,

> "If in the improvement of the navigation of a public river, the waters of a tributary stream are so much raised as to destroy a valuable mill site situate thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws directing compensation to be made for private property taken for public use."

Canal Comrs. vs. Kempshall arose between the riparian claimant to water power and the State operating to improve navigation. Therein, the Chancellor said (413),

> "That the State was liable for the damages sustained by the defendant in error in the **diversion of the waters of the river from his mill.** He had the right to hold to the middle of the stream, and even to erect buildings there, if he chose to do so. The only restriction upon his right to use the bed of the river absolutely as his own, was the right of the public to navigate the stream."

Senator Verplanck said (418-419),

> "**The complete right to the usufruct and enjoyment of those waters for milling,** or any other purpose to which water or its mechanical power is applicable, **is appurtenant to the ownership of the soil and banks.** The only limitation to that right is, that the waters shall not be used, diverted or detained, so as to infringe upon the same and equal rights of use and enjoyment of other fluvial or riparian proprietors. On that ground, the defendant is entitled to damages as compensation for the injury to his private property, sustained for the public use, in the construction of an aqueduct for the enlarged canal."

People vs. Canal Appraisers was a contest between a riparian claiming water power and the State operating to improve navigation. Herein was held the same rule as in the Tibbits case. But nowhere in the elaborate opinion of thirty-seven pages is there a suggestion that the water power was not the private property of the riparian. Judgment went on the ground that such private property was subject to the easement of the State to improve navigation.

Chenango Bridge Company vs. Paige, presents a contention between a ferry bridg company incorporated by the state of New York, with exclusiv authority to bild a bridg within certain limits, on the one side, and riparians who bilt a bridg within the limits, on the other side. Therein the court said,

> "Any person owning the land upon both sides of such a river can maintain a ferry or

> bridge or dam for his own use ,provided he does it so as not to interfere with the public easement, without any authority from the legislature, and even in defiance of a legislative prohibition. In such case he would but be making a proper use of his property. Such use must, however, be such as not to interfere with the rights of other riparian owners.''

Dermott vs. the State of New York, involvd indirectly the title of the riparian to the water power as agenst the State. Therein the Chief Justice said (106-7),

> ''Although the north spout of the Mohawk might be a navigable stream, that fact alone did not preclude the lawful acquisition by McDonald & McIntyre of a **mill-site and dam thereon**, or rebut the presumption of ownership arising from the admission of that fact, expressly made by the State in the recitals of the act of 1822. Even if such stream was navigable it was competent for the State to grant, and for them to acquire, the right to erect a dam thereon, and to possess the same as their individual property.''

### OTHER STATE DECISIONS. (12)

Walker vs. Board of Public Works, involvd a

---

NOTE 12—Walker vs. Bd. Pub. Works, 6 Ohio, 540 (1847);
Minnesota vs. Minneapolis Milling Co., 26 Minn., 229 (1879).

contention in behalf of a riparian proprietor respecting the diminution of his water power by operations in aid of navigation. The chief Justice said (543-4),

> "In disposing of this subject it is well, in the first instance, to consider what are the respective rights of the public and riparian owners in the streams within our borders, which are in fact navigable. The question is not new in this State. It has been repeatedly before this court, and the rule is this: He who owns the land on both banks of such river, owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement.—The right of the public is merely the right to use the water within the channel for the purposes of navigation. The proprietor of the lands upon its banks may use the waters of the river in any way not inconsistent with the public easement, or of private rights, and neither the State nor any individual has the right to divert the water to his injury. The right of the adjacent proprietor to the water of the stream is an usufructory right, appurtenant to the freehold, not an absolute property. Hence the State in its exercise of the right of eminent domain can subject the waters of such stream to other public uses the same as any other private property, by making a just compensation for the injury, and not otherwise."

The value of this decision is somewhat impaird by the fact that it was questionabl whether the stream was in fact navigabl, altho it had been declared navigabl by the legislature.

State of Minnesota vs. Minneapolis Milling Company involvd the taxation of water powers. The question was, Wer they real estate or personal property? The Minneapolis Milling Company had been, by its charter,

> "authorized, for the purpose of the improvement of the water-power above and below the Falls of St. Anthony, in the Mississippi River, to maintain the present dams and sluices, and to construct dams, canals and water sluices, erect mills, buildings or other structures, for the purpose of manufacturing in any of its branches or improving **any water-power owned or possessed by said company,** in such manner and to such extent as shall be authorized by the directors of said company."

The Court says, by Justice Berry (232),

> "The right of a riparian proprietor upon a navigable stream, such as the Mississippi, rests, as is held by this court in the case above cited, upon the fact of riparian ownership; that is to say, the riparian proprietor possesses this right because he owns the land upon the bank; and this is equivalent to saying that the right is attached as an incident to the riparian land, and belongs, and appertains, to the same. * * * The defendant is the owner of the bank, and of the right to the use of the water, and, therefore, of the right to make his right to the use of the water available by using the bed of the stream. In the defendant's hands the riparian land, and the right to the use of the water, and to the use of the bed of the stream, are held together. The principal, which is the riparian land, draws to it the incident, which is the right to the use of

the water so that the latter is part and parcel of the former. The defendant's right, as riparian proprietor, to the use of the water, is not conferred by the provision before quoted from its charter. The effect of this section is to define the corporate powers of the company, and to signify the assent of the government to the use of the river, in the manner and for the purposes in said section mentioned.

It follows from what we have said that the defendant's right to the use of the water is, for all purposes of taxation,, real property and not personal.''



In Holyoke Water Power Company vs. Connecticut River Company, plaintiff was riparian on Connecticut River in Massachusetts abuv tide water. Defendant was Connecticut corporation organizd under legislation of Connecticut to improve the Connecticut River. Plaintif sought to restrain operations of defendant in aid of navigation in Connecticut on account that they injurd its water

---

NOTE 13—Holyoke W. P. Co. vs. Connecticut River Co., 52 Conn., 570 (1884);
Same case, 20 Fed. Rep. 71.
Kau. W. P. Co. vs. G. B. & M. Canal Co., 142 U. S. 254 (1891);
U. S. vs. Great Falls Mfg. Co., 112 U. S., 645 (1884);
Great Falls Mfg. Co. vs. Attorney General, 124 U. S., 581 (1888).

power in Massachusetts. Decree restraining flowage.

In Kaukauna Company vs. Green Bay and Mississippi Canal Co., Mr. Justice Brown says (269),

> "The only question involved in this case proper for us to consider, is whether the act of the legislature of Wisconsin of August 8, 1848, reserving to the State the water power created by the erection of the dam over the Fox River, as construed by the Supreme Court of the State, and the proceedings thereunder, operated to deprive the plaintiffs in error of their property without due process of law."
>
> (270) "Second. If the erection of the dam and embankment be treated as an assertion of the exclusive right to the water power in front of these lots, perhaps the maintenance of this dam and embankment may be regarded as a continuous deprivation of the rights of the riparian owner to such water power, within the meaning of the constitutional provision."
>
> (271) "Practically the only question is, whether this act was valid in so far as it authorized the State to take and appropriate the water power in question.
>
> It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels."
>
> (272) "To what extent he was entitled to the use of the water power created by

the dam, as against the public and the other riparian owners, may be difficult of ascertainment, depending as it does largely upon the number of proprietors, the width and depth of the river, the volume of the water, the amount of fall, and the character of the manufactures to which it was applicable.''
* * *

(272-3) ''The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose, is doubtless a proper exercise of the authority of the State under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain.'' * * *

(276) ''So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or the embankments or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation.'' * * *

(277) ''Inasmuch as the dam abuts upon this lot, its owner was doubtless entitled to compensation for the land occupied by the dam and embankment, as well as for the

value of the use of the water diverted from its natural course."

(279) "The question of compensation is one separate and apart from the transfers of which this property was the subject, but one which in honor as well as in law was chargeable upon the public."

United States vs. Great Falls Mfg. Company arose out of the taking by the United States for the domestic use of Washington and Georgetown, of the waters of the Potomac at a point abuv the ebb and flow of tide. The Great Falls Mfg. Co. was the claimant, as riparian, of the land and water taken which included a water power situate in the state of Maryland.

Great Falls Mfg. Co. vs. United States arose out of a taking of similar and connected property of the same claimant, situated in Virginia, for the same purpose, that is an enlargement of the plant.

In the course of the first taking in 1863 the question of compensation on each one of four plans was submitted to arbitration. The arbitrators determined in 1863 that

"if the United States shall adopt and decide to execute the plan of operations designated in the specifications and on the plat as Dam A, being the first plan of operations mentioned in the said specifications, then the Great Falls Manufacturing Company are legally entitled to the sum of sixty-three thousand seven hundred and sixty-six dollars ($63,766) as compensation for the use and occupation by the United States of the land, water rights, and privileges claimed by the said company, and all consequential

> damages * * * * upon the condition that the said company, as against the United States, may lawfully build and maintain a canal and bulk-head across and upon the land of the United States on the Virginia shore of the Potomac * * * so as to use the water of the pool above dam A subject to the superior right of the United States to use the water for the aqueduct." (583-4.)

The United States then adopted and executed, not Plan A, but Plan 4. The later taking was substantially upon this Plan A. In respect to it, Mr. Justice Harlan said (595),

> "It will be remembered that the award of 1863 covered four alternative plans for the Potomac dam of the Washington aqueduct. The United States adopted and executed only Plan 4, and thereby manifested its purpose not to adopt and execute Plan A. Neither the Government nor the company is bound by that award, so far as it relates to plans which the United States did not adopt and execute. The present inquiry in respect to land or water rights taken from the plaintiff must, therefore, be conducted with reference to their value—not in 1863, when the Government declined to take them, but—in 1883, at the time of their being condemned for public use under the act of 1882. It is, consequently, an immaterial circumstance that the award of 1863 reserved to the company, as against the United States, the right to maintain a canal and bulkhead across and upon the land of the United States, on the Virginia shore of the Potomac. No such reservation is made by the act of 1882, and the officers charged with

> its execution were not required to concede any such right, though, of course, the United States are bound to make just compensation to the company for property rights of whatever description taken from it for, and appropriated to, public use.''

It has seemed to me that the riparian ownership of the water power was plainly and distinctly declared in the Kaunkauna case. (70 Wis., 635; 142 U. S., 254). Also that it can be taken from the riparian for public use only on making just compensation. Respecting the decisions in this case, Professor Gilmore in an erlier brief said,

> ''In this connection it is necessary to distinguish the case of Green Bay and Mississippi Canal Co. vs. Kaukauna Water Power Co., 70 Wis., 635, on which great reliance has been placed to prove that the riparian rights include the right to the fall of the water; that such right is property and cannot be taken without compensation. The court does not decide that the defendant was entitled to some compensation for the water power. They decide no more than that the defendant is entitled to some compensation and that the act of 1848 with the act of Congress of 1875 provide adequate provision for compensation for all property taken, 'And this, we think, includes any deprivation or interruption of any legal riparian right.' But the court does not undertake to specify what is included within 'legal riparian rights.' '' (pp. 25-6).

In a later brief he seems to abandon this position, and admit that the courts did determin there-

in that the property of the riparian which coud not be taken without compensation was the water power. He now seeks to avoid the force of these decisions by claiming that they ar not in point. He says (39) that this case

> "does not deny the right of the State to take the surplus water power for public use without compensation."

By necessary inference, the constitution forbids the taking for any other than a public use.

But he proceeds to distinguish between different kinds of public uses. He says (85-6),

> "It should be noticed further that the case deals only with a situation where **surplus** water power results as an incident to the improvement of navigation, which surplus was devoted to **private** uses; but suppose there had been no surplus water power; that all the water was needed for the public use of navigation or for other public purposes? The defendant would none the less be deprived of its water power. The court does not purport to decide that where all the water is needed for the public use of navigation or other legitimate public use, and a total appropriation for that use takes place, that the riparian owner is entitled to compensation for the loss of the right to use the water for power. There was in fact in this case more water than was needed for navigation or for any other public purpose, and the power resulted from this surplus of water. If there had been no surplus, there would have been no power. Even granting, for the sake of argument merely, that the court could on the issues presented have decided that the riparian owner was entitled

> to compensation for the loss of water power, the decision goes no further than recognizing a right to compensation for so much of the water or such use thereof as was not necessary for the public use of navigation and which surplus was turned to private uses. In other words, the court does not decide that in the exercise of the public right of use of all the water for navigation, compensation must be made to the riparian owners for the loss of the use of the water for power. Nor does the court decide that if the surplus had been used for public purposes, compensation would have been necessary to the riparian owner.''

The taking in this case was justified on the ground that the otherwise private use, being necessarily commingled with the public use, became, by such commingling, a public use. Such is the well setld rule of law. (13a).

---

NOTE 13a—Att'y Gen. vs. Eau Claire, 37 Wis., 400, 435;
State vs. Eau Claire, 40 Wis,., 533, 541-2-3;
Hubbard vs. Toledo, 21 O. St., 496;
Malone vs. Toledo, 34 O. St., 541;
Water Works Co. vs. Buhkhardt, 41 Ind., 364;
Cronne vs. Canal Co., 71 Ind., 208, 211;
Wyoming Coal Co. vs. Price, 81 Pa. St., 156;
Dingley vs. City of Boston, 100 Mass., 544, 559;
Heyward vs. Mayor of New York, 7 N. Y., 314, 325;

But Mr. Gilmore takes the position that while the taking for the public use, of navigation, on account of the necessary commingling, entitles the riparian to compensation as adjudgd, the taking for another kind of public use—to-wit, running a municipal lighting plant—would not entitle the riparian to compensation.

The taking is for the purpose of navigation, tho the use of the surplus may be to furnish power to a factory. The use does not determin the purpose. Otherwise there coud be no taking. The puprose is the main thing. The use of the surplus a collateral.

In Heyward vs. Mayor, the purpose was for an almshouse under an act authorizing the condemnation of the fee. The almshouse was discontinued. The city platted the lands and sold the lots. The Court held that the public use for an almshouse justified the taking of the fee and that the later use was incidental to the taking.

In Dingley vs. Boston, the taking was for the public purpose of abating a nuisance by filling overflowed lands in the Back Bay. Held that the fee might be taken and that the incident, the filled land, having become the property of the city, might be used for business purposes.

---

Rexford vs. Knight, 11 N. Y., 308, 314;
Spaulding vs. Lowell, 23 Pick., 71, 80;
George vs. School Dist., 6 Metc. 497, 510;
French vs. Quincy, 3 Allen, 9, 12, 13;
Railroad vs. Davis, 2 Dev. & R. (N. C.) L. 451.

Mr. Gilmore says (62),

> "If the riparian owner within the limits of his own land can get a sufficient fall of water to turn the machinery without encroaching upon the reciprocal rights of other riparian owners or encroaching upon the rights of the public, whatever they may be, a water power is part of the riparian estate."

It can hardly be claimed in view of the cases cited in note 25 herein that in the absence of section 1596 prohibiting dams in navigabl rivers without authority of the legislature, the riparian owner on a public navigabl river, owning both banks and the bed of the river, coud not bild a dam not interfering with navigation. If so, according to Mr. Gilmore, if he coud

> "get a sufficient fall of water to turn the machinery without encroaching upon the reciprocal rights of other riparian owners or encroaching upon the rights of the public, whatever they may be," then "a water power is part of the riparian estate."

This ability to create a water power as "part of the riparian estate" certainly is private property which cannot be taken from the riparian except for public use, and then only upon just compensation. Hence, so far as Section 1596 prohibits the bilding of a dam, not interfering with navigation, by the riparian to render his water power availabl, it must be unconstitutional and void.

Evidently no such prohibition was intended. Evidently the provision is intended as a police regulation to protect navigation. Hence, any legislation authorizing the riparian to dam any public

stream for power purposes, but giving no right of eminent domain, does not confer a franchise, but is simply in the nature of a license. It is practically nothing more than a certificate that the proposed dam, bilt as conditiond, wil not interfere with navigation. It is equivalent in law, and of same nature, as a bilding permit in a city.

But does Mr. Gilmore answer that one condition upon which "the water power is part of the riparian estate" is that the riparian in making same availabl must not encroach "upon the rights of the public, whatever they may be" and that the right to use the water for power is one of the "rights of the public" upon which he must not encroach? If that is the answer, it resolves the entire statement abuv quoted into vacuity. It makes it equivalent to saying that the riparian may make "a water power * part of the riparian estate" if he can do so without using the water power which is "one of the rights of the public." In other words, the riparian can make "a water power * part of the riparian estate" if he can. But he cannot because it belongs to the public.

### TIDE WATER POWER

It seems that the power of tide water has been used by the riparian as his private property. (13b)

The **French Canadian common** law seems to vest the water power in the riparian. (13c)

---

NOTE 13b—Urch vs. Portsmouth, 69 N. H., 162 (1890);
Murdock vs. Stickney, 62 Mass., 113, 116 (1851):
Stout vs. Millbridge, 45 Me., 77 (1858).

NOTE 13c—Miner vs. Gilmour, 12 Moo. P. C., 131, 156-7; 14 E.R.Rep.,861(1858).

## STATE CLAIM.

Claim is made

That, on admission of Wisconsin into the Union, it became, unquestionably, the owner as of soveren right, of the navigabl rivers and of every right therein, public or private.

That the water powers passed to the State on account that they were incdient to, and parcel of, the subaqueous lands.

That altho the State has relinquishd the river beds of navigabl rivers to the riparian, such relinquishment did not carry the water powers because it held them as soveren, in trust for public use for all the pepl, under the rule in Illinois Central vs. Illinois (142 U. S., 387), and numerous other cases to same effect.

That its title to such powers is analogous to its right to use public waters for navigation and fishery.

## ABSTRACT.

Whatever title or interest the State may have in or to any property, private or governmental, in the State, must hav cum to the State from and thru the United States. The title of the United States in such property must hav cum from and thru the deed of Cession by the State of Virginia. In 1780, the State of Virginia claimed title to the territory northwest of the Ohio and east of the Mississippi, including the states of Ohio, Indiana, Ililnois, Michigan and Wisconsin, and the Eastern part of Minnesota. This claim was practically conceded by the United States, so far as related to the space

now comprising Wisconsin and Michigan, tho some portions of such territory wer claimed by other of the original thirteen states.

Feeling the burden of the public det and the difficulty of adjusting divers claims to the uninhabited territory claimed by the various States, the United States on the 10th of October, 1780, resolved,

> "That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which shall become members of the Federal Union, and have the same rights of **sovereignty, freedom and independence**, as the other States: * * *
>
> That the said lands shall be granted or settled at such times, and under such regulations, as shall hereafter be agreed on by the United States, in Congress assembled, or any nine or more of them."

Pursuant to this resolution, the State of Virginia, by act January 2, 1781, submitted a proposition for the Cession of her western lands. This proposition was by act of Congress, September 13, 1783, accepted. Virginia, by act October 20, 1783, authorized her delegates in Congress to make a deed of Cession. On March 1, 1784, the Virginia delegates tendered a deed of Cession of lands including the present states of Wisconsin and Michigan, purporting to

> "convey, transfer, assign, and make over, unto the United States in Congress assembled, for the benefit of the said States,

all right, title, and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being, to the northwest of the river Ohio, * * * upon condition that the territory so ceded shall be laid out and formed into States, * * * having the same rights of **sovereignty, freedom, and independence,** as the other States. * * *

That **all the lands** within the territory so ceded to the United States * * * **shall be considered as a common fund** for the use and benefit of such of the United States as have become or shall become members of the Confederation of federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.''

This deed of Cession was accepted.

Later there was some slight modification of the grant, not material to the question at issue, wherein it was recited that the states to be formed from this territory

> ''shall hereafter become members of the Federal Union and have the same rights of sovereignty, freedom and independence as the original states,''

This modification included the ratification by Virginia of the Ordinance of July 13, 1787, for the government of the territory northwest of the Ohio.

By act approved April 20, 1836 (5 Stat. ch. 54),

Congress established the territorial government of Wisconsin and provided by section 6 thereof that

> "**No law shall be passed interfering with the primary disposal of the soil.**"

By act approved August 6, 1846 (9 Stat. ch. 89), Congress authorized the pepl of the Territory of Wisconsin

> "to form a constitution and State government for the purpose of being admitted into the Union on an equal footing with the original States in all respects whatsoever."

This enabling act, sec. 7, sub. 5, provided,

> "That five per cent. of the net proceeds of sales of all public lands lying within the said State, * * * shall be paid to the said State for the purpose of making public roads and canals in the same as the Legislature shall direct: Provided, that the foregoing propositions herein offered are on the condition that the said convention which shall form the constitution of said State shall provide, by a clause in said constitution, or an ordinance, irrevocable without the consent of the United States, that **said State shall never interfere with the primary disposal of the soil within the same by the United States,** nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof;"

On February 1st, 1848, the constitution of the State of Wisconsin was adopted. Pursuant to this provision of the enabling act, the constitution, article II, section 2, provided that

> "The propositions contained in the act of Congress are hereby accepted, ratified

and confirmed and shall remain irrevocable without the consent of the United States; and it is hereby ordained that **this State shall never interfere with the primary disposal of the soil** within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof;''

By act of Congress approved May 29, 1848, Wisconsin was

''admitted into the Union on an equal footing with the original States in all respects whatsoever.''

It was further provided by said act that

''The five percentum of the net proceeds of the public lands therein mentioned shall be held and disposed of by said State in the manner and for the purposes recommended by said convention.''

**Salient Points.** The salient points in this abstract of title ar that the states to be formed out of the Northwest Territory shall be admitted into the Union ''having the same rights of sovereignty, freedom and independence as the other states'' or ''the original states'' on the one side, and on the other side, ''That all the lands * * * shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the Confederation or Federal Alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for

that purpose, and for no other use or purpose whatsoever.''

To protect itself agenst State action in hostility to the execution of this trust, the United States requird the assurance that Wisconsin woud ''never interfere with the primary disposal of the soil.'' This indicates the importance of the trust in view of the United States.

This bargain between Virginia and the United States must be construed in view of the then conditions, and the then views, respecting soverenty on the one side, and property, water power property, on the other side. If the right to use the flow of a non-tidal, navigable river was then, according to common understanding, property—if the Courts woud then hold it to be property—parcel of the riparian estate, then the State never owned it, or any interest in it except as a member of the Federation, and the right to take for public use on making just compensation. But if the Court woud then hav held it to be a soveren right, it passed to the State by the Virginia deed of Cession and the enabling act.

In answer to this, Professor Gilmore says (61-2),

> ''The contention is undoubtedly true to the extent that the United States has retained full control of the primary disposition of non-submerged lands, and that the title to up-lands is derived from the Federal patents. As already pointed out, however, the Federal courts have uniformly held that the patents confer no rights beyond the meander line and whatever rights the pantentee gets beyond that line, either in

the submerged lands or the right to use the water is to be determined by the law of the state in which the land is located. While it is true that riparian rights are parcel of the riparian or bank estate, the scope and content of the riparian rights are dependent upon corresponding rights in other riparian owners and upon certain rights in the public. Whether the riparian right included a water power depended, as has been shown, upon the natural physical conditions of the stream, which determined whether the water could be turned to this use without encroaching upon the property or rights of others, and depended further upon the extent to which the public had a right to use the water. As the law stood in 1784, the date of the Virginia Cession, whether a water-power was parcel of the riparian estate would be determined by the same general conditions as exist to-day. It is not possible to assert dogmatically that a water power, at a particular point in time, is or is not a part of the riparian estate. It may, or may not be, depending upon circumstances. That was true in 1784 and it is true to-day. If the riparian owner within the limits of his own land can get a sufficient fall of water to turn the machinery without encroaching upon the reciprocal rights of other riparian owners or encroaching upon the rights of the public, whatever they may be, a water power is part of the riparian estate. But his right is controlled by the correlative rights of other riparians and the paramount right of the public. The line between public rights and private rights was no more sharply drawn in 1784 than now.

> The classification of waters into public and private was a part of the common law of England and Virginia in 1784, and it was recognized that the scope of the riparian right was narrower with respect to lands bordering on public waters than lands bordering on private waters. To what extent the scope of the riparian right on public waters would be restricted by the exercise of public rights would necessarily have to be left to be determined by the development of the law with respect to the scope of public rights and activities in general.''

It is true that

> ''It is not possible to assert dogmatically that a water power, at a particular point in time, is or is not a part of the riparian estate.''

But the most authoritativ interpretation of a document, other things being equal, is that made nearest in time and place to the making of the document. The nearer to the use of the words in time or place the more akin to the spirit of the words.

Also interpretation is especially valuable when it is agenst the interest of the interpreter.

In which class was the water power then understood to be? At about the time of the Virginia Cession, that is in 1786, a treaty was concluded between New York and Massachusetts presenting substantially the same question. This treaty came up for judicial interpretation in 1841 and agen in 1883. (14).

---

NOTE 14—Commissioners vs. Kempshall, 26 Wend., 404, 420 (1841);
Smith vs. Rochester, 92 N. Y., 463, 476 (1883).

ABSTRACT

In Smith vs. Rochester, the Court says (476),

> "The ownership and jurisdiction over the lands in the southwestern part of the State in which Hemlock lake is located, were, in the earlier history of this country, subject of much controversy between the sovereign States of Massachusetts and New York. These differences were finally adjusted by a treaty executed between the respective States, in December, 1786, whereby the State of New York did cede, grant, release and confirm to the said Commonwealth of Massachusetts, and to the use of the Commonwealth, their grantees and the heirs and assignees of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted), which the State of New York hath, of, in or to, the lands in question; on the other hand, the State of Massachusetts ceded to New York all claim to the government, sovereignty and jurisdiction of the lands described."

The contention was between riparian owners of water power on Honeoye Creek, the outlet of Hemlock Lake, on the one side, and the City of Rochester taking water from Hemlock Lake under the authority of the legislature of New York for public purposes, on the other side. Chief Justice Ruger pronounced the opinion of the Court and in such opinion said respecting the treaty provisions,

> "Subsequent to this treaty there remained in the State of New York only such rights of property in these lands as necessarily pertained to its sovereignty and were

inalienable by the sovereign. All such rights of property in or to the territory in dispute as could, by the most comprehensive and absolute conveyance, be granted to another were, by this treaty, conferred upon the Commonwealth of Massachusetts and its grantees. * * * The settlers in this territory derive the title to their lands from the Commonwealth of Massachusetts and have become possessed of all of the rights which that state acquired in such lands by virtue of the treaty of cession or otherwise.

It now remains to consider the nature of the rights of property which pertain exclusively to sovereignty and which do not pass to the grantee under a conveyance of the soil bordering upon and adjoining freshwater navigable lakes and rivers.''

The opinion then proceeds to assert the right of the riparian to restrain the city of Rochester from withdrawing water from Hemlock Lake, which was a part of the navigable waters of New York, and thereby reducing the volume of the flow in the Honeoye Creek and impairing the water powers of the riparians thereon. The decision is put upon the ground that the use of this public water for power was a property right vested in Massachusetts by the treaty and not a soreven right vested in New York.

In Commissioners vs. Kempshall, the contention was respecting the interference by the State, in the interests of navigation, with the right of the riparian owner to water power. The riparian claimed title under the state of Massachusetts thru the treaty. Chancellor Walworth said (413),

''that the State was liable for the dam-

ages sustained by the defendant in error in the diversion of the waters of the river from his mill. He had the right to hold to the middle of the stream, and even to erect buildings there, if he chose to do so. The only restriction upon his right to use the bed of the river absolutely as his own, was the right of the public to navigate the stream.''

Senator Verplanck said (420),

''Under the compact of 1786, which settled the long controversy between New York and Massachusetts, concerning the title to a large portion of Western New York, this State, by formal deed, 'ceded, granted, released and confirmed to Massachusetts all the estate, right, title and property, (the right of government sovereignty and jurisdiction excepted) which the former had to a large territory, comprising the whole tract of country through which the Genesee runs, from its source to where it flows into Lake Ontario.' By a legislative act of Massachusetts, the territory was, in 1778, granted to Phelps and Gorham, and became, in every sense, private property. By the very letter of the compact and grant, the whole bed of the Genesee passed as so much land under water, comprehended in the granted territory. The usufruct of water flowing over it is a part of, and incident to, the fee. There was no exception or saving in the grant, except that of 'government, sovereignty and jurisdiction.' The title to the river, then, must have passed just as fully as the title to the lands formerly under water about the island of Manhattan or in the bay of Newburgh, now covered by wharves and piers.

> The reservation of the privileges appurtenant to sovereignty could no more involve the continued property in the waters in the one case than in the other. The public rights of navigation are, indeed, under the trust and authority of the State, and these are easements or servitudes which the State is bound and empowered to preserve and protect as a trustee for its citizens.''

Suppose a water power, or foundation for a water power, to now exist on land not entered. Does the State own it on account of its soverenty, or does the United States own it in trust for the benefit of all the states?

If the United States shoud secure a large price on sale of riparian land, on account of the water power appurtenant to the same, who would receiv the purchase price?

That the water powers remained property of the United States, and passed by its grant to the riparian, has been the uniform opinion of Federal and State Courts and Federal and State legislatures from the erliest setlment of the country to this time. See some of the State and Federal decisions and legislation hereinbefore referd to, and very many decisions between private parties in other states, and legislativ acts of Wisconsin and other States and the United States. They ar too numerous to mention.

See also the Sault case. (post 67-8-9.)

See also United States vs. Rio Grande Irrigation Company (174 U. S. 690) wherein (703), Mr. Justice Brewer said,

> ''First, that in the absence of specific au-

thority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.''

INCIDENT TO BANK, NOT TO BED.

Riparian rights, including right to water power, pertain to the bank, and not to the bed, of the stream. It is, as its name implies, a riparian or bank right. (15).

---

NOTE 15—Diedrich vs. Railroad Company, 42 Wis., 248 (1877);
Fox River Paper Company vs. Kelley, 70 Wis., 287, 294-5, 298 (1887);
Lyons vs. Fishmongers L. R., 10 Ch., 679; Same Case, L. R. 1 App. Cas., 662 (1876);
Canal Appraisers vs. The People, 17 Wendell, 571 (1836);
People vs. Tibbits, 19 N. Y., 523 (1859);
Brisbine vs. Railway, 23 Minn., 114 (1876);
Carli vs. Railway, 28 Minn., 373 (1881);
State vs. Milling Co., 26 Minn., 229 (1879);
Canal Comrs. vs. Kempshall, 26 Wend., 404, 418-9 (1841);
Walker vs. Board of Public Works, 16 Ohio, 540 (1847);
Morrill vs. St. Anthony's Falls, 26 Minn., 222 (1879);
Minnesota vs. Minneapolis Milling Co., 26 Minn., 229 (1879);
United States vs. Ch. D. W. W. P. Co., 152 Fed. 25 (1907);
United States vs. Ch. D. W. W. P. Co., 206 U. S. 447 (1908);
G. B. & M. C. Co. vs. Kau. W. P. Co., 70 Wis., 635, 653 (1888);

Minnesota holds title to beds of navigable rivers to be in the State and not in the riparian. Having this fact in view read quotation (ante 27-8) from State of Minnesota vs. Milling Company.

Kent says,

> "Important questions have arisen in respect to the use of running waters, between different proprietors of portions of the same stream; and such questions are daily growing in interest, as the value of water-power is more and more felt in manufacturing establishments.
>
> Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, * * without diminution or alteration. * * * * Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

---

K.-C. Co. vs. Hewitt, 79 Wis., 334, 337 (1891);
Wilts & Bukrs vs. Swindon, L. R. 9 Ch. App. Cas. 451 (1874);
Lewis Em. Dom. Sec. 61b, p. 74, Vol. 1.
Coulson & Forbes, 62-3-4.
Coulson & Forbes, 110-1-2.
Kents Com., 11th Ed., V. 3, *439;
Gould on Waters, Sec. 148;
Farnham on Waters, V. II., Sec. 463, pp. 1568-9, 1570.

Gould says,

> "The distinction between tide waters and fresh, or between public and private waters, is not necessarily a material consideration in determining questions relating to riparian rights, since riparian rights proper depend upon the ownership of land contiguous to the water and are the same whether the proprietor of such land owns the soil under the water or not."

Then he quotes from Lord Selborne in Lyon vs. Fishmongers' Co.,

> "The rights of a riparian proprietor, so far as they relate to any natural stream, exist **jure naturae**, because his land has by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. With respect to the ownership of the bed of the river, this cannot be the foundation of riparian rights properly so called, because the word 'riparian' is relative to the bank, and not to the bed of the stream."

Farnham says,

> "The right of the riparian owner is a natural right and depends upon the fact that the stream is furnished him by nature. * * * The rule is well stated in Sampson vs. Hoddinott, where it is said all persons on the margin of a flowing stream have by nature certain rights to use the water of the stream whether they exercise these rights or not, and they may begin to exer-

> cise them whenever they will. * * * The right depends, not upon ownership of the soil over which the water flows, but upon lateral contact with the water.''

The only water power of a non-tidal navigabl river which has been held not to be the property of the riparian (except in case of special reservation) is the Niagara power. It has been held in the inferior courts of New York that this power belongd to the State. (16).

The decision was based on the ground that the Niagara, being an international river, the State, and not the riparian, owned the bed thereof. Appeal in this case to the Court of final resort of New York was forbidden by statute. This statute, on appeal attempted, was held valid and appeal dismist. (17).

---

NOTE 16—In Re State Res., 16 Abb. N. C., 159 (1884);
In Re State Res., 37 Hun., 537 (1885).

---

NOTE 17—In Re State Res., 102 N. Y., 734 (1886).

## NOT INALIENABLE.

That the State has, if it coud, turnd over to the riparian, by both legislation and judicial decision, all its interest, if any, in the water powers of its navigabl rivers cannot be douted.

But claim is made that the right to use the water of a public river for power is not a property right, but a public right, a governmental right held in trust for all the pepl; and, hence, incapabl of alienation. It is claimd that the soveren grant fails on account of the want of power of the soveren to make the grant.

How can changes in the art of using property or changes in the object of the use change the title to the property?

## PRIVATE BY NATURE.

Rivers ar stampt as public by the fact that they ar navigabl. If navigabl, then public. If non-navigabl, then private. Navigation has been held a public right from the dawn of commercial history. Whether fishing on a navigabl, non-tidal river is a private or public right has been, and is now, in this country, debatabl,—a bone of contentention.

In Willow River Club vs. Wade, 100 Wis., 86, (1898), two of the Justices held that it was a public right, as incidental to navigation; and two held it to be a public right, irrespectiv of its relation to navigation. Navigation is held to be a public right, because in its nature it is usabl by, and of use to, all. In that respect the right of fishing is analogous. But the right to use the water for power is not, in its nature, fit for use by all. It is essentially

private property. It can be enjoyd only by sole ownership. It is not analogous to the right of navigation, or the right of fishing. In fact, it is essentially inconsistent with navigation. Where there is, in fact, water power, there is, to that extent, no navigation.

### NOT NEW

Some may suppose that the view that the riparian does not own the water power of the stream, but that it is, in some way, public property—of public use, is new. But this is a mistake. This view prevailed, for a time, many years ago in England, and the result was the decision of the King's Bench in Williams vs. Morland (2 Barn. & Cress, 391). At 393, Judge Bayley said,

> "My judgment in this case is founded on the nature of flowing water, and the manner in which an exclusive right to it is obtained. Flowing water is originally **publici juris.** So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains **publici juris.** The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public."

But this rule proved unsound and in 1833, this case (Williams vs. Morland) was reverst by the same court in Mason vs. Hill, (5 Barn. & Ad .1). Therein Lord Chief Justice Denman said (19),

> "The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream, flowing in its natural course, and to use it when

he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below—that neither can any proprietor above diminish the quantity or injure the quality of water, which would otherwise descend, nor can any proprietor below throw back the water without his license or grant:—and that, whether the loss by diversion, of the general benefit of such a stream be or be not, such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

The proposition of the defendants is, that the right to flowing water is **publici juris**, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, **including** the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interes; and in default of his having done so, may altogether deprive him of the benefit of the water.''

After discussing these claims, he says that the plaintiff's contention is correct. All the associate judges concurd.

In 1851, the question came before the Court of Exchequer in Embrey vs. Owen (6 Exch. 353). Therein Baron Park, refering to Kent's Commentaries and some American decisions, said (368),

> "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; * * * that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream." * * "But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

The rule announced in the latter cases has since that day been held to be the law of England. (18).

If water power is in its nature public, then why does not a stream furnishing it, become public irrespectiv of navigability? We call a river furnishing navigation public because it meets the public use,to-wit, navigation. Then if water power is a public use, why is not a river furnishing water power public because it meets a public use, to-wit, water power.

So the question woud seem to be not simply—Does the State or the riparian own the water power of a public stream? but—Does the State or the riparian own the water power of all streams; and are all streams furnishing water power public?

---

NOTE 18—Swindon Water Works vs. Wilts and Burks Canal, L. R. 7 E. & I, App. 697 (1875);
Sampson vs. Hodinot, 87 E. C. L. R. 590, 610 (1857);
Hindson vs. Ashby, 2 Ch. 1 (1896);
Coulson & Forbes, pp. 113to 116, (1902).
Hamelin vs. Bannerman, 1895, 11 R., 368;
Miner vs. Gilmour, 12 Moo. P. C., 131 156-7, 14 Rep., 861.

LEGISLATION AND DECISION.

The suggestion that water power is, by nature, of public and not private use runs counter to the entire cours of legislation and judicial decision of this country. This appears plainly from every decision and every statute hereinbefore referd to and to some others hereinafter to be mentioned.

The contention is that the use of water power is essentially a public use held by the State in trust for all the pepl and hence incapabl of alientation. If so, water power created by State authority, primarily for power, is inalienabl. Then it necessarily follows that water power incidental to works constructed by State authority for another public purpose, as for water supply or navigation, must be inalienabl. The fact that its creation is the incidental result, and not the primary object, of the construction cannot render a water power private property and alienable, which, if it were the primary object of the construction, woud be a soveren trust and hence inalienabl.

**The Eau Claire Case.** The Eau Claire case (19) involves constructions and proposed constructions upon the Chippewa, a navigabl river. In Attorney General vs. Eau Claire, Chief Justice Ryan says (435),

---

NOTE 19—Attorney General vs. Eau Claire, 37 Wis., 400 (1875);
State vs. Eau Claire, 40 Wis., 533 (1876).

"In considering this motion, we shall assume that the city possesses adequate power to establish water works.

And that is so essentially a public municipal purpose, that it is obvious that the city can take any legitimate power in aid of it. For that purpose, the legislature could unquestionably grant and the city take power to construct and maintain a dam, not obstructing the navigation of a public river, or violating other right, public or private. And the dam so authorized might well produce an excess of power. **Superflua non nocent.** In such case, as was frankly admitted on the argument, the surplus water need not run to waste. The legislature might well grant, and the city take, power to lease it. The power to construct and maintain the dam would still rest on the public municipal use; not on the disposition of the accidental excess."

In State vs. Eau Claire, Chief Justice Ryan says (541), refering to the former decision,

> "Since that decision, and obviously in view of it, the legislature has amended the statute of 1875 by ch. 231 of 1876. And the amendment so clearly and emphatically makes the power to construct the dam dependent on the power to construct water-works, and limits the power to lease the water-power to the excess not required for the water-works, as to place the power beyond criticism in that respect."

**Fox River Case.** Act approvd August 18, 1848, declared title to the water powers created by the Fox and Wisconsin Improvement to be in the State. See reference to same hereinbefore on page 9.

Section 1 of Chapter 283, Acts of 1850, provides that,

> "The board of public works are hereby authorized and empowered in any future lettings of contracts for the improvement of the Fox and Wisconsin rivers, to consider bids made by any person or persons, for improvements which will create a water power, and when such person or persons offer to perform, or perform and maintain the work in consideration of the granting by the State to him or them, his or their assigns, forever, the whole or a part of such water power:"

Section 3 provides that,

> "When lettings have been made for the improvement of said rivers, whereby a water power is created, the Board of Public Works may relinquish to the person or persons who have performed the same, all or a part of such power as a consideration in full or in part, for such performance or maintenance of such improvement, or for both:"

In Green Bay and Mississippi Canal Company vs. Kaukauna Water Power Company (20), Mr. Justice Lyon says (650-1-2),

---

NOTE 20—Green Bay and Mississippi Canal Co. vs. Kaukauna Water Power Co., 70 Wis., 635 (1888).

"It requires no argument to demonstrate that the water-powers reserved to the state by sec. 16 of the act of 1848 were granted to the Fox & Wisconsin Improvement Company, by ch. 98, Laws of 1853; that the same passed to the plaintiff by the purchase on the foreclosure of the trust deed and mortgage, and the conveyance thereof to it by the trustees and mortgagee therein; and that, in its conveyance to the United States, the plaintiff reserved to itself all of the surplus water-power created by the improvement.

We conclude, therefore, that whatever rights the State took to the Kaukauna water-power by the act of 1848 (which is the absolute ownership of the whole thereof, if that is a valid act), is vested in the plaintiff." * * *

"It was impossible to make the improvement in a proper manner, and to meet the requirements of navigation, without creating some surplus water-power. But for the reasons above suggested such surplus was merely incidental to the improvement.

In Attorney General vs. Eau Claire, 37 Wis., 400, and again in State vs. Eau Claire, 40 Wis., 533, it was held that a statute which authorized the city of Eau Claire to erect a dam and raise the waters of the Chippewa river for the purpose of creating public water-works in said city, and which granted to the city the right to lease the surplus water-power created by such improvement, was a valid law. In the opinion of the court, prepared by Ryan, C. J., in each case, speaking of the power granted

to the city to construct water-works, it is said:''

Here follows in quotation paragraf hereinbefore quoted from the Eau Claire case. (Ante 61.)

Respecting this matter, Mr. Justice Brown of the Federal Supreme Court says (21),

> ''But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permittink the State to let out the use of it to private parties, and thus reimburse itself for

---

NOTE 21—Kaukauna W. P. Co. vs. Green Bay M. C. Co., 142 U. S., 254 at 273 (1891).

the expense of the improvement.'' * * *

''If the State could condemn this use of the water with the other property of the riparian owner it might raise a revenue from it sufficient to complete the work which might otherwise fail.''

In a later case (22) Mr. Justice Shiras quotes this language of Mr. Justice Brown with approval. (77-78).

Mr. Justice Shiras further says (79),

''As previously stated, the State of Wisconsin, by its act of October 3, 1856, granted and conveyed to the Fox and Wisconsin Improvement Company all the rights and interest of the State in the improvement, including the water powers created thereby, and, in case the sales of the granted lands should fail to realize a sumsufficient to complete the intended works of improvement and to pay the outstanding indebtedness of the State, and redeem the bonds issued by the Company, the State authorized the sale of the water powers created by the said improvements. And, subsequently, by act of March 23, 1871, the State authorized the Green Bay and Mississippi Canal Company, which had become the owner of the entire improvement works, lands and water powers by purchase at the foreclosure sale, to sell and dispose of the same to the United States.''

---

NOTE 22—Green Bay and Mississippi Canal Co. vs. Patten Paper Co., 172 U. S., 58 (1898).

He further says (80),

> "The substantial meaning of the transaction was, that the United States granted to the Canal Company the right to continue in the possession and enjoyment of the water powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works, and that the United States were credited with the appraised value of the water powers and appurtenances and the articles of personal property." * * *
>
> "So far, therefore, as the water powers and appurtenant lots are regarded as property, it is plain that the title of the Canal Company thereto cannot be controverted; and we think it is equally plain that the mode and extent of the use and enjoyment of such property by the Canal Company fall within the sole control of the United States."

**Niagara Case.** See note 16. The Niagara case holds the Niagara water power to be incidental to, and to pass with, the subaqueous lands, which lands it holds to be the property of the State on account that the stream is international. But tho this water power is held to be the property of the State, it is held to be, not trust property held for public use but, private property of the State subject to lease for private manufacturing purposes. That it is so held and used is matter of common knowledge.

The decision also sustains the private claims of some riparians to some of the power on the ground, not of riparian ownership but, of prescriptiv use.

In that particular, the commission, by Hale, Commissioner, says (193),

> "As to the water power. The commissioners have not thought it necessary to decide the question which was so very thoroughly and ably argued before them, as to whether a prescriptive right to the use of the waters of the Niagara River can be obtained as against the State. Differing somewhat in their views as to the strict legal question, they have concurred in the belief that it was just and proper to make allowance for such water power where it is now in use, and has been for the period prescribed by the statute. They have, therefore, practically decided this question in favor of the claimants, and have allowed what in their judgment is the full value of the water power which has been used for the prescriptive period."

On review of this case (37 Hun., 549), Judge Bradley said,

> "The right to the usufruct of the water (except for purposes of navigation) is proprietary, and that of the State is paramount."
>
> (550) "Beyond the fact of navigation, the rights in the river are proprietary only."

**Sault Case.** (23.) This case relates to the River St. Mary, an international boundary. Herein the varia-

---

NOTE 23—U. S. vs. Chandler-Dunbar W. P. Co., 152 Fed. Rep., 25 (1907);
U. S. vs. Chandler-Dunbar W. P. Co., 209 U. S., 447 (1907);
Act of Congress, No. 317, Approved March 3, 1909.

tion in right, to the bed of the stream, on account of the international character of the stream asserted in the Niagara case is denied by the Federal Supreme Court. Therein, Mr. Justice Holmes says (453),

> "The fact that it is a boundary has not been held to make a difference. The riparian proprietors upon it own to the center."

No title to water power was directly involvd in this case. But soon after its determination, the United States, having failed to establish its claim of title to riparian lands and islands in the stream, declard that the riparian lands and islands shoud be taken, under Federal right of eminent domain, for Federal public use for navigation.

Such taking necessarily involvd the wiping out of the riparian's claim to water power. Nothing woud be left for it to be attacht to, or used upon, after the taking of the bank and the bed of the stream. Hence, the United States assumed that, on condemnation of the riparian and subaqueous property, the water power woud pass with it. The United States was the riparian owner on the lower section, about half, of the falls, not having parted with the title which it received from Virginia by deed of cession. The Ch. D. W. P. Co. was riparian on the upper section.

In view of its ownership of part of the power, and the intended condemnation of the other part, the United States enacted that (sec. 12 of Public Act No. 317),

> "The right to the flow of water, and riparian, water power, and other rights, now or hereafter owned by the United States, in the Saint Mary's River in Michigan shall be forever conserved for the benefit of the Government of the United States, primraily

for the purposes of navigation and incidentally for the purpose of having the water power developed, either for the direct use of the United States, or by lease or other agreement, through the Secretary of War, who is hereby authorized to make such leases or agreements: Provided, That a just and reasonable compensation shall be paid for the use of all waters or water power now or hereafter owned in said Saint Mary's River by the United States, whether utilized in said river or in any lateral canal, said compensation to be fixed by the Secretary of War: * * * It is intended that any excess of water in the Saint Mary's River at Sault Sainte Marie over and above the amount now or hereafter required for the uses of navigation shall be leased for power purposes by the Secretary of War upon such terms and conditions as shall be best calculated in his judgment to insure the development thereof.''

This legislation rests on the view that water power is private, not governmental, property; and that the United States became the owner of it by Virginia cession; and that same did not pass to Michigan on its admission to the Union, but where the riparian land has not been sold by the United States is still owned by the United States. Michigan was admitted into the Union on substantially the same basis as Wisconsin.

## STARE DECISIS.

There is a maxim of the law, very well setld, of long standing, and very useful in the administration of justice. It is **Stare decisis.**

In the first instance, it may be true, as said by Justice Powell, that "Nothing is law that is not reason." But, after a decision has been rendered, the language of Sir Wm. Jones is more important. He says, respecting the maxim of Powell, "This is a maxim, in theory, excellent; but in practice dangerous; as many rules, true in the abstract, are false in the concrete."

> "It is not always that Courts may freely inquire, in determining a case before them, What is the law? Sometimes investigation should stop when it is ascertained what has been decided upon the subject." Harrow vs. Meyers, 29 Ind., 469, at p. 470.

> "That judge who * * * would overturn a rule which for years had settled the rights of property, should be regarded as the common enemy of mankind, and as unworthy of the high trust that had been confided to him." Welch vs. Sullivan, 8 Calif., 165, 188.

> "None but the strongest reasons would justify. * * * * * Fickleness in Courts is always to be depricated, but especially in materrs relating to titles to real estate." Pioche vs. Paul, 22 Calif., 106, 109.

> "The error would have to be most palpable to justify this Court in overruling previous decisions. The stability of judicial decisions is of the utmost consequence, as on them reposes the security of property; and they are not to be tampered with to suit the

views of different persons.'' Reed vs. Owmby, 44 Mo., 204, 206.

''This construction having become a rule of property, it should not be changed without an imperious necessity.'' Taylor vs. French, 19 Vt., 49, 53.

''When a rule of property has been once deliberately adopted and declared, it ought not to be disturbed by the same Court, except **for very cogent reasons.** Otherwise the community would never be able to deal with safety and would be in a state of perplexed uncertainty as to the law.'' Goodell vs. Jackson, 22 Johns, 693, 722.

''But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been **res nova,** it is not at liberty to disturb or unsettle such decision unless impelled by the **most cogent reasons.**'' Baker vs. Lorrillard, 4 N. Y., 257, 261.

''When, as in this case, the decision has relation to large amounts of a species of property which assumes a value in the market, changes hands and is dealt with upon the confidence reposed in the correctness of the decision of the highest judicial tribunal in the State, nothing short of the **most urgent necessity,** to prevent injustice, or vindicate clear and obvious principles of law, would justify us in departing from it.'' Kearny vs. Buttles, 1 Oh. St., 362, 366.

"It would be better, no doubt, if all judicial decisions were made upon correct logical principles, but that cannot be while intellectual infirmity exists, and experience has shown that it is less injurious to endure the evils of an unsound precedent than to change it when the result would cause confusion and disappoint and damage parties who have relied upon it as an established rule of law." Paulson vs. Portland, 16 Oreg., 450, 457.

"That decision was rendered by judges occupying the same position as we do, and, while we do not indorse it, nor regard the reasons upon which it was predicated as satisfactory, yet we do not feel at liberty to depart from it in this particular case." Corvallis vs. Stock, 12 Oreg., 391.

"To overthrow decisions thus made, except upon the **most cogent reasons**, would be productive of the highest mischief." Bellows vs. Parsons, 13 N. H., 256, 261.

"Such rules become landmarks and ought to be preserved like ancient monuments or immemorial boundaries to land." Anderson vs. Jackson, 16 Johns., 382, 402.

Fisher vs. Horicon I. & M. Co. involvd the consideration of the constitutionality of the mill dam law, so called. Justice Cole said,

"The main question which we are invited to consider is the constitutionality of the mill dam law. This question we cannot

> regard as open for investigation and discussion at the present time. It was fully and carefully considered * * * in the case of Newcome vs. Smith * * * and the constitutionality of the law affirmed.'' (10 Wis., 351-2, 1860.)
>
> ''Considerations of this nature, relating to questions of property acquired under the belief that a former decision was correct, cannot be disregarded when we are called upon to set such decision aside. The rule **stare decisis** has great force in such a state of things and emphatically applies.'' (354.)

Babb vs. Mackey involvd the constitutionality of the mill dam law. Therein Justice Cole said, refering to the case of Fisher vs. Horicon I. & M. Co.:

> ''We are earnestly pressed by counsel who denied that power, and the validity of our present law, to reconsider the decision of the former Supreme Court in the case of Newcome vs. Smith. * * * For reasons given in the opinion in that case, we have declined to depart from the doctrine laid down in Newcome vs. Smith, and consequently the power of the legislature to pass such laws is not now an open question.'' (10 Wis., 371-377, 1860.)

In Franzini vs. Layland, 120 Wis., 72, 1903, Justice Marshall said (82),

> ''There is no opportunity now for retreat. The State has taken its position, and property rights upon all of our rivers have become vested with regard thereto, and the Supreme Judicial authority has many times affirmed that it possesses discretionary au-

thority to part with its trust property to the extent mentioned.—That is in such ways as do not substantially affect the purposes of the trust.''

This was said in relation to the well settled rule that the riparian owns to the middle thread of public navigable rivers.

## FEDERAL QUESTION.

In the end the question will be for the Federal Supreme Court. This Court has determinedly sustained rules of property once established by a State court. Where property has been acquired, or contracts made, in view of, and on faith in, a setld rule established by a State court, the Federal Supreme Court wil not depart from such established rule, but will enforce the same notwithstanding subsequent variant State decisions. (24).

---

NOTE 24—Hardin vs. Jordan, 140 U. S., 371, 384, 389, 397, (riparian rights) (1891);
Morgan vs. Curtenius, 61 U. S., 1 (title to lands) (1857);
Gelpcke vs. Dubuque, 68 U. S., 175 (municipal bonds) (1863);
Muhlker vs. R. R., 197 U. S., 544 (eminent domain) (1905);
Lee County vs. Rogers, 74 U. S., 181 (county bonds) (1868);
Douglas vs. Pike County, 101 U. S., 677 (county bonds) (1879);
Supervisors vs. Schenck, 72 U. S., 772, 785 (county bonds) (1866).

## RIGHT TO DAM.

It is said that, whatever may be the right of the riparian to the water power, he is not at liberty to build a dam in a public river without authority from the State, and that, hence, on giving such authority, the State shoud take a price for its consent.

Grant for sake of the argument that the State has the **power**, which it has not, to prevent the riparian's building a dam, not interfering with navigation, in a public stream, without a charter. Certainly it has no such **right.** Aesop of old tels the fable of the dog who coudn't eat the hay but continued to lie on it so that the ox coudn't eat it. The dog had the power but not the right. The right of the State is only to safe-guard the public interest of navigation, fishing and other such interests, if any. The only proper function of the dam charter is to certify that when the dam is bilt as provided, it wil not, in the opinion of the legislature, hinder navigation or fishing or other public use of the river, if any. If it woud so hinder, then the State cannot properly authorize it for, or without, a price. The State cannot, like Esau, sel its birthright. The attribute of soverenty is to serv the pepl, and it cannot sel that attribute. May the legislature say to the riparian,—Your proposed dam wil not hinder navigation if you pay this price, but if you wil not pay the price, then we judge that it wil hinder navigation? May the State falsify its judgment for a price? It shoud not ask a price of its citizens for what does not hurt the pepl. It shoud not hurt the pepl for a price. When the State authorizes a dam, injurious to the public, for a price, the voice may be the "voice of Jacob, but the hands ar the hands of Esau" taking the price of his birth-right.

Suppose the riparian declines to be held up. The State cannot use the power any more than the dog coud eat the hay, and the ox not being fed can do no work. Then this force of nature servs nobody.

Probably, on account of its effect on climatic conditions affecting the public health, the State may regulate the cutting of timber. But when the cutting does not injuriously affect the public, ought the State to put a price upon the cutting? Or when it does seriously affect the climate, may the State allow the injury to be done for a price? May the timber owner impair the climate for twenty-five cents a thousand? May the State quarantine against disease, and release from quarantine for a price?

But it is said that a rental of twenty-five cents per hors-power is nominal. True it is.

The water power is owned by the riparian or the State. If it is owned by the riparian, why shoud he be required to pay rent? If it is owned by the State, how can the State justify itself in renting it for the twelfth to the fortieth part of its rental value?

The right of the State being only to preserve, for the public, its rights of navigation and fishing, may not the riparian bild such dam as wil not impair those rights without expres authority from the State? So it woud seem from decided cases. (25).

---

NOTE 25—Janesville vs. Carpenter, 77 Wis., 288 (Rock) (1890);

Janesville vs. Carpenter involvd the validity of an act of the Wisconsin legislature forbidding the erection, by a riparian, of a bilding in the bed of a public navigabl river, which bilding did not interfere with navigation. The Court held the act unconstitutional and void as an unjustifiabl atempt to interfere with a property right of a riparian. In expressing the opinion of the Court, Justice Orton quoted from an opinion of Mr. Justice Chase of the Federal Supreme Court the following vigorous language: (303)

> "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. * * * The nature and ends of the legislative power will limit the exercise of it. * * * There are certain vital principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative power,—as to authorize manifest injustice by positive law, or to take away that security of personal liberty or private property for the protection whereof the government was established. An act of the legislature

---

Stevens Point Boom Co. vs. Reilly, 46 Wis., 237 (Wisconsin) (1879);
Cohn vs. Wausau Boom Co., 47 Wis., 314 (Wisconsin) (1879);
Conn vs. Little Suamico, 74 Wis., 652 (Little Suamico) (1889);
Grand Rapids vs. Powers, 89 Mich., 94, 102, 104, 111 (Grand) (1891);
Chenango Bridge Co. vs. Paige, 83 N. Y., 179 (Chenango) (1880);
Lewis Em. Dom., Sec. 70.

> (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.''

Grand Rapids vs. Powers involvd the power of the legislature to authorize a city to establish a dock line acros the land of the riparian, and thereby exclude him from improving for water power, an unnavigabl part of the river. Therein Justice Morse said (p. 113),

> ''The police power of the legislature of this State is not omnipotent. It cannot, under the guise of regulation, destroy property rights arbitrarily and without reason.''

In Chenango Bridge Company vs. Paige (185), Justice Earl said,

> ''The Legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purposes of regulating, preserving and protecting the public easement. Further than that, it has no more power over these fresh water streams than over private property. It may make laws for regulating booms, dams and bridges only so far as is necessary to protect and preserve the public easement, and when it goes further, it invades private rights protected under the constitution.''

Lewis on Eminent Domain says, refering to Janesville vs. Carpenter (V. 1, Sec. 70),

> ''A statute making it unlawful to drive piles or build piers, cribs or other structures in the bed of a private navigabl river with-

> out regard to whether the same obstruct navigation was held invalid as depriving the riparian owners of their property without compensation and without due process of law.''

Mr. Justice Moody uses some language in Knoxville vs. Water Company (212 U. S. 1 at 18) (1909) which also seems pertinent here.

> ''The Courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which follows.''

In this connection note the pertinent language of Justice Marshall in Rossmiller vs. State (114 Wis., 169 (1902), at 188),

> ''Since the whole beneficial use of navigable lakes is unchangeably vested in the people, every one within the State having the right to enjoy the same so long as he does not invade the like right of another, without any interference by claim of paramount right to the subject thereof, any law invading that individual possession is, in effect, an invasion of the right to liberty and property without due process of law, contrary to said fourteenth amendment. **Any such invasion for the purpose of adding to the public revenues, exacting from a person,**

**for the benefit of the state, compensation for the enjoyment of a right which belongs to him and which he has a right to enjoy without paying therefor,** violates sec. 13, art. I, of the state constitution, prohibiting the taking of private property for public use without just compensation.

It is a matter of keen regret that we are compelled to place the stamp of judicial condemnation upon the work of co-ordinate branches of the government. That is true in any case, but it is especially true here, since it turns to naught a strongly fortified supposed new discovery of a rich source for adding to the revenues of the state.''

## INADEQUACY OF PRICE.

It may be said that $1.25 per acre was an inadequate price for riparian lands, and that hence the State may be justified in a cours which woud otherwise be unjustifiabl; that is, in withholding permission to the riparian to improve his water power.

In 1848 the Wisconsin Constitutional Convention urged Congress not only to reduce the price of Fox River lands and Rock River Canal lands from $2.50 per acre to $1.25 per acre, but also to refund to purchasers of Rock River Canal lands the excess over $1.25 per acre theretofore paid by them. (26).

---

NOTE 26—R. S. 1858, p. 54-5;
5 U. S. Stat., 245;
5 U. S. Stat., 455, Sec. 9;
9 U. S. Stat., 283.

In this connection it shoud be remembered that, except as related to a few land grants, it was not the State which held the riparian lands and with them the water powers. The State never owned them. The State never was entitled to the price of them. If they had been held by the United States for a larger price than that for which they wer sold, such policy might have delayed the sale and retarded the setlment of the State. If sale had been made for the larger price, the gain woud not hav been the gain of Wisconsin, except as one of the beneficiaries under the deed of Cession. Wisconsin got the gain by sale at a cheaper price thru encouragement of immigration. It may hav lost a small fraction of a high price.

The western provinces of the Dominion of Canada are now outbidding the United States in price of argicultural lands, and drawing capital and labor and good, law-abiding and thrifty citizens from the United States. This fact presents to the United States a question of policy:—Shall we withhold the public lands from sale and hence necessarily retard present development in hope for better conditions in the future? That was the problem which Wisconsin faced in the fifties and sixties. Wisconsin then favored sale of public lands at the cheapest price in order that the resources of the State might be rapidly developd. Shall she now seek to take, by indirect means, what she was then eager that the United States shoud sel for her benefit? She has eaten her cake and waxed fat on it. Shall she now, like Jeshurun, kick? (Deut. 32:15).

## ULTRA VIRES.

There ar cases where the soveren grant fails on account of want of power of the soveren to make the grant. But the suggestion of such failure, in any case, is an unwelcome one. Especially in the case where, if the suggestion is valid, it wrecks so many, so large, and so useful investments, and necessarily arrests the development of so large a proportion of the enterprises of the day.

To justify the assumption of title to these water powers by the State, the grounds of the assumption shoud not be doutful. They shoud be most plain, certain and reliabl. And however plain, certain and reliabl these grounds may be, the assumption must stil smack of bad faith. It must stil appear that such retaking is on the reasoning that the original sale of the property by the United States to the riparian was a wrong; and that such wrong tends to justify another wrong to be done by now taking the property from the riparian.

"Sublime philosophy! Benignant light!
Which sees, in every pair of wrongs, a right."

In a case wherein the United States attacked the title of a riparian claiming under its patent, (27), Judge Severens, expressing the opinion of the Court, said (41),

> "It derogates from the dignity and char-character of the government to suppose that, formed as it is, to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, with-

---

NOTE 27—U. S. vs. Chandler-Dunbar W. P. Co., 152 Fed. Rep., 25 (1907).

> out regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another.''

If this view of the nature of, and title to, water powers is right, then the foundations on which we hav heretofore rested title to property ar broken up. It then becomes a question of time and circumstance when the title to any kind of property may fail. Whether it is right that there shoud be private ownership of natural resources is a question with which this brief does not medl.

When timber shal becum of public use and hence the State may take it; when farm land shal becum of public use and hence the State may take it; then if water power shal becum of public use, the State may take it. But until we reach the time when all natural resources shall be held to be soveren property, inalienabl by the State, it woud seem that water powers shoud continue to be held private property of the riparian, to be taken for public use only on making **just compensation.**

Oshkosh, Wis., January, 1910.

MOSES HOOPER.

## SYNOPTICAL INDEX


RIPARIAN OWNERSHIP ..... 1—38
Common Consent ..... 1
Relinquishment by State ..... 1—17
State Legislation ..... 2— 8
State Decisions ..... 8—17
New York Cases ..... 18—25
Other State Decisions ..... 25—28
Federal Decisions ..... 28—38
Tide Mills ..... 38
Canadian Law ..... 38
STATE CLAIM ..... 39—83
Abstract ..... 39—51
Incident to Bank ..... 52—55
Not inalienable ..... 56—69
Private by Nature ..... 56—57
Not New ..... 57—60
Eau Claire Case ..... 60—61
Fox River Case ..... 62—66
Niagara Case ..... 66—67
Sault Case ..... 67—69
Stare Decisis ..... 69—74
Federal Question ..... 74
Right to Dam ..... 75—80
Inadequacy of Price ..... 80—81
Ultra Vires ..... 82—83


H 250 84

HECKMAN
BINDERY INC.
NOV 84
N. MANCHESTER,
INDIANA 46962

LC FT. MEADE
0 018 998 056 5